

1 Loren Kieve (56280)
2 KIEVE LAW OFFICES
3 2655 Steiner Street
San Francisco, California 94115
(415) 364-0060
lk@kievelaw.com

5 Stephen D. Susman (*pro hac vice*)
SUSMAN GODFREY LLP
1000 Louisiana, Suite 5100
6 Houston, TX 77002-5096
(713) 651-9366
7 ssusman@susmangodfrey.com

8 Meng Xi (280099)
SUSMAN GODFREY L.L.P.
9 1900 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
10 (310) 789-3100
mx@susmangodfrey.com

12 Counsel for Plaintiff
Grouse River Outfitters, Ltd.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

16 | GROUSE RIVER OUTFITTERS, LTD.,

CASE NO. 16-CV-02954 LB

**GROUSE RIVER'S REPLY IN
SUPPORT OF ITS MOTION FOR
CLARIFICATION OF THE COURT'S
FURTHER ORDER AND CHART
REGARDING ALLEGED
ACTIONABLE REPRESENTATIONS
(DKT. 291)**

Plaintiff,
vs.
ORACLE CORP.,
Defendant

1 In its initial Order on this subject, Dkt. 88, the Court had the following entry on its actionable
 2 statements chart (at page 12:6):

3	4	5	6	7	8	9	10	Actionable
								The statement that NetSuite “could meet the vast majority of Grouse River’s requirements” is a specific representation about the functionality of the product because it was made in the context of knowing what specific requirements Grouse River had asked for (<i>see SAC ¶¶ 41–51</i>).

11 The full allegation in the Second Amended Complaint in paragraph 42, included in the range
 12 referenced by the Court above, is as follows:

13 42. Grouse River’s core objectives for the new system were outlined in
 14 terms of specific functional areas in a detailed written document entitled
 15 “Grouse River Requirements” that was provided to NetSuite and to which
 16 NetSuite sales representative Cole Waldron responded on October 24, 2013
 17 in an e-mail stating “As we discussed previously, I have used your
 18 requirements documents to call our natively delivered functionality as well
 19 as customizations and partner solutions. (attached.”

20 TX 200 is the e-mail Cole Waldron sent that is referred in this paragraph of the SAC and in
 21 subsequent complaints, including the operative Fourth Amended Complaint. It sets out NetSuite’s
 22 acknowledgements and representations regarding Grouse River’s “specific requirements about the
 23 functionality of the product because it was made in the context of knowing what specific
 24 requirements Grouse River had asked for.” Dkt. 88 at 12:6–10. NetSuite’s representation that it
 25 could meet the “vast majority of Grouse River’s requirements” is reflected in the answers Mr.
 26 Waldron inputted in the second column of the spreadsheet attached to the cover email in TX 200.
 27 Where the word “Native” appears in the column next to the column of Grouse River’s requirements,
 28 that was NetSuite’s confirmation that the feature was “native” to or included in its platform, without
 the need for further customization. TX 200 is a document traded between Grouse River and
 NetSuite, with Mr. Fallis sending Grouse River’s requirements to Mr. Waldron, and with Mr.

1 Waldron annotating which requirements were “native” to the NetSuite platform.

2 Contrary to Oracle’s argument, TX 200 falls squarely within the Court’s ruling to support
 3 the actionable allegations identified in Dkt. 302. The context and content of TX 200 were also
 4 consistently pleaded in the case since the initial complaint. *See* Dkt. 1 at 8:8, ¶ 31 (“Grouse River’s
 5 core objectives for the new system were outlined in terms of specific functional areas in a detailed
 6 written document entitled ‘Grouse River Requirements’ that was provided to NetSuite and to which
 7 NetSuite responded on Oct 24, 2013.”). Thus, TX 200 does not “contain new alleged representations
 8 not set forth in the Court’s chart,” and TX 200 was specifically identified in Grouse River’s
 9 complaint. *Cf.* Dkt. 306 at 3:18-20.

10 The Court has repeatedly confirmed that where, as here, Grouse River gave NetSuite
 11 detailed requirements, and NetSuite said it could meet them, those are actionable statements. *See*,
 12 *e.g.*, Dkt. 88 at 2:11-13 (“Grouse River later relied on express statements that NetSuite made that it
 13 could deliver a software system that would have the capability to meet Grouse River’s
 14 requirements.”), 6:23-7:3 (“NetSuite’s representation that it could deliver a software system that
 15 would have the capability to meet Grouse River’s requirements is not puffery. Grouse River
 16 provided NetSuite with a specific list of requirements. NetSuite said it could meet those
 17 requirements. In a different context, a statement that a product could meet a customer’s needs might
 18 be generalized “puffery.” But in the case here, given that Grouse River asked if NetSuite could meet
 19 specific requirements, was plausibly reasonable for Grouse River to rely on the representation that
 20 NetSuite would deliver a product that met those specifications. NetSuite’s representation that it
 21 could meet the requirements outlined by Grouse River therefore is not mere ‘puffery.’”). The Court
 22 should therefore clarify that Grouse River may use TX 200 and TX 355 to support its proof of some
 23 of the actionable statements.

24 To the extent Oracle alleges that the trial exhibits at issue do not support the actionable
 25 statements identified in the Court’s Order at Dkt. 291, that would be a misreading of Grouse River’s
 26 chart at Dkt. 302 (not to mention a failure to actually read the annotated exhibits attached to Grouse
 27 River’s motion). Grouse River’s chart identifies actual excerpts from each **trial exhibit** that support
 28 the actionable statements in the Court’s chart, identified by their number (1-16). The identification

1 is not intended to be a paraphrase or duplication of each actionable statement. Using TX 168 as an
 2 example, excerpts from that exhibit state:

3 **Search optimization.** Customize search criteria settings using exact, starts with,
 4 partial or fuzzy matches to optimize results. Generate SEO-friendly URL links.

5 **[M]erchandising.** Present upsells, cross sells and related products, based on
 merchant-driven rules such as location, browsing behavior, items in cart, best
 sellers or over-stocked items.

6 **[D]esign.** Build sites that display elegantly across all devices, from smartphones to
 tablets to laptops to desktops.

7 **Searchandis[ing].** Promote products in search results based on search keywords
 and phrases or leverage product attributes such as top sellers, top rated and new
 arrivals.

8 **Inventory visibility.** Show real-time inventory data, including how many products
 are available online or in a particular store.

9 Dkt. 302 at 2:7-17. The above excerpts from TX 168 support actionable statement #5, which states
 10 in part:

11 **Site search.** Solr provides capabilities like type ahead recommendations and
 12 customized search criteria settings to optimize results. Generate SEO friendly URL
 links.

13 . . . **[M]erchandising.** Present upsells, cross sells and related products based on
 merchant driven rules such as location, browsing behavior, items in cart, best sellers
 or **higher margins**.

14 **Mobile.** . . . **[D]esign enables** sites to display elegantly across all devices including
 desktops, **mobile** phones and tablets.

15 **Searchandising.** Promote products in search results based on search keywords and
 phrases or leverage product attributes such as top sellers, top rated and new arrivals.

16 **Inventory visibility.** Show real time **product** availability **on your web store**.

17 **Automatically removed out of stock items from your site.**

18 Dkt. 291 at 9:2-12 (the green text highlights the word choice differences between TX 168 and
 19 actionable statement #5). Although the statements in TX 168 are not verbatim restatements or an
 20 100% match of actionable statement #5, that is not the requirement. TX 168 contains the key phrases
 21 relating to NetSuite's offerings as spelled out in actionable statement #5. Having now tied the
 22 contents of the exhibit to each actionable statement, Grouse River should be allowed to use it to
 23 establish that actionable statement #5 was made by NetSuite.

24 To the extent Oracle argues that the actionable statements identified in the trial exhibits at
 25 issue are not pleaded in the complaint, that is a logical fallacy. The chart at Dkt. 302 ties each trial
 26 exhibit to one or more of the numbered actionable statements from the Court's Order in Dkt. 291.
 27 The Court has already found each actionable statement included in Dkt. 291 to have been properly

1 pleaded, so any exhibit that contains an excerpt which can be properly tied to one or more actionable
2 statements would also, by definition, have been pleaded. As the Court emphasized in its companion
3 January 5, 2018 Order to Dkt. 88, its Dkt. 87 ruling on Grouse River's suggestion that led to Dkt.
4 88, the context in which statements were made is still relevant. *See* Dkt. 87 at 3:5-9. Extra words
5 contained in an exhibit that include actionable statements and repetition of the actionable statements
6 are relevant to the reasonableness of Grouse River's reliance, and the Court can certainly instruct
7 the jury to this effect, but they should not make the exhibit inadmissible.

8 Dated: June 28, 2019

Loren Kieve
KIEVE LAW OFFICES

Stephen D. Susman
Meng Xi
SUSMAN GODFREY L.L.P.

12 By: /s/ Loren Kieve
13 Loren Kieve

14 Attorneys for Plaintiff
Grouse River Outfitters, Ltd.